FILED BY CLERK
SEP 12 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRANDON LEE TUCKER, Appellant.	2 CA-CR 2011-0354 2 CA-CR 2012-0043 (Consolidated) DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court
THE STATE OF ARIZONA, Appellant, v. BRANDON LEE TUCKER, Appellee.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103033001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and Joseph L. Parkhurst — Tucson
Attorneys for Appellee/Appellant

Lori J. Lefferts, Pima County Public Defender
By Kristine Maish Tucson
Attorneys for Appellant/Appellee

B R A M M E R, Judge.

¶1 Brandon Tucker appeals from his conviction and sentence for second-degree murder. Tucker contends the jury instructions the trial court gave regarding the lesser-included homicide offenses denied him "the full benefit of the reasonable doubt standard, thereby violating his constitutional rights." We affirm.[1]

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Tucker's conviction and sentence. *See State v. Bigger*, 227 Ariz. 196, ¶ 2, 254 P.3d 1142, 1145 (App. 2011). During a social gathering in August 2010, Tucker became belligerent and was asked to leave. He headed toward his father's nearby residence, followed about fifteen minutes later by his father, T. A short time later, when J. went to check on them, he saw Tucker running down the road with his arms bloodied and raised in the air while saying, "I killed my dad." J. found T. lying on the ground with his head between two rocks and a boulder on his head, but still breathing. Another witness had seen Tucker kicking T. on the ground. Paramedics were unable to revive T., who died from a blunt impact to his torso that lacerated his spleen.

[1]The state also filed a notice of appeal from the trial court's denial of restitution. However, the state has failed to pursue that consolidated case on appeal and thus we will not address it.

¶3 Tucker was charged with first-degree murder. After a seven-day jury trial, Tucker was convicted of second-degree murder and sentenced to a mitigated prison term of ten years. This appeal followed.

Discussion

¶4 Tucker contends the trial court erred in rejecting his proposed instructions permitting the jury to consider the lesser-included offenses of homicide. He argues the final instructions the court gave were erroneous because they "require[d] the jury to either acquit or hang on second degree murder before allowing it to consider manslaughter upon adequate provocation." Tucker contends the jury should have considered simultaneously second-degree murder and manslaughter upon adequate provocation. We review de novo whether jury instructions correctly state the law. *State v. Roque*, 213 Ariz. 193, ¶ 138, 141 P.3d 368, 401 (2006). In making that determination, we review the instructions given as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Thus, "[a] case will not be reversed because some isolated portion of an instruction might be misleading." *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989).

¶5 Tucker's proposed instructions stated: "You can consider whether the defendant is guilty of either second degree murder or manslaughter by sudden quarrel or heat of passion. You may find the defendant guilty of manslaughter without first considering whether or not he is guilty of second degree murder." In contrast, the instructions the trial court gave told the jury to consider the lesser-included offense of

manslaughter if it found the defendant not guilty of second-degree murder or if it was unable to agree.[2] The instructions further stated that "a person commits manslaughter by recklessly causing the death of another person" or "committing second-degree murder upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim."

¶6 Tucker argues on appeal that manslaughter upon sudden quarrel or heat-of-passion is not an "actual" lesser-included offense of second-degree murder because, pursuant to A.R.S. § 13-1103(A)(2), a person can commit manslaughter by "[c]ommitting second degree murder . . . upon a sudden quarrel or heat of passion resulting from adequate provocation by the victim." Therefore, he contends, the trial court erred in modeling its instructions from *State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). This court on two prior occasions has addressed an argument similar to the one Tucker presents here, and both times found any error in the instructions given did not result in prejudice. *See State v. Eddington*, 226 Ariz. 72, ¶¶ 29-33, 244 P.3d 76, 85-86 (App. 2010); *State v. Garcia*, 220 Ariz. 49, ¶¶ 3, 7, 202 P.3d 514, 515, 516 (App. 2008). We likewise determine that any error in the instructions given here was harmless.

¶7 As this court recognized in *Eddington*, and as Tucker correctly points out on appeal, the error in the instructions that the trial court gave is that a jury following the instructions "would never reach the issue of adequate provocation in order to find a

[2]The instructions given were modeled from *State v. LeBlanc*, 186 Ariz. 437, 438, 924 P.2d 441, 442 (1996). *See also State v. Eddington*, 226 Ariz. 72, ¶ 29, 244 P.3d 76, 85 (App. 2010).

defendant guilty of manslaughter . . . rather than second-degree murder." *Eddington*, 226 Ariz. 72, ¶ 31, 244 P.3d at 85-86. This is so because the instructions directed the jury to consider sudden quarrel or heat-of-passion manslaughter only if it found the defendant not guilty of second-degree murder or if it could not agree whether he had committed second-degree murder after considering the evidence. Therefore, a jury that found the defendant guilty of second-degree murder might never consider whether the defendant is instead guilty of heat-of-passion manslaughter even though that offense contains all the elements of second-degree murder plus a different required circumstance. *See* § 13-1103(A)(2); *Peak v. Acuña*, 203 Ariz. 83, ¶ 6, 50 P.3d 833, 834 (2002) (lesser-included offense of manslaughter includes all elements of greater offense of second-degree murder but specifies different circumstance).

¶8 However, as we noted also in *Garcia*, 220 Ariz. 49, ¶ 7, 202 P.3d at 516, "[t]he trial court clearly explained that sudden-quarrel or heat-of-passion manslaughter included the elements of second-degree murder." And like the jury in *Eddington*, here "the jury was aware both from defense counsel's argument and from the trial court's instructions that, if the murder was the result of a sudden quarrel or the heat of passion stemming from adequate provocation by the victim, [Tucker] would be guilty of the less serious offense of manslaughter, not second-degree murder." 226 Ariz. 72, ¶ 32, 244 P.3d at 86. The jury was instructed further that if it found Tucker guilty of "either second-degree murder or manslaughter but [had] a reasonable doubt as to which it was" it was required to find him guilty of manslaughter. Consequently, the lesser offense of

manslaughter was "in [the] jurors' minds" when they considered second-degree murder. *Id.* Moreover, we presume jurors both follow the instructions given, *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006), and would not disregard the definition of manslaughter provided to them when rendering a verdict on second-degree murder, *Garcia*, 220 Ariz. 49, ¶ 7, 202 P.3d at 516. Accordingly, reviewing the instructions as a whole, *see Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d at 268, any legal flaws in the instructions given were harmless. *See State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005); *see also Eddington*, 226 Ariz. 72, ¶ 32, 244 P.3d at 86 (finding similar instruction did not result in prejudice).

¶9 Tucker also argues "the improper lesser-included offense sequencing . . . shifted the burden of proof to the defense to prove the element of adequate provocation by the victim." He contends the state had "little or no incentive to prove" he had acted upon a sudden quarrel or heat-of-passion resulting from adequate provocation. Thus, Tucker asserts, the trial court committed fundamental error by not requiring the state to prove he had not acted upon a sudden quarrel or heat-of-passion. But the court instructed the jury that the state was required to prove "all of its case" against Tucker beyond a reasonable doubt and that the state "may prove manslaughter but fail to prove the more-serious crime of second-degree murder." And the jury was instructed further that it must consider all of the instructions. By finding Tucker guilty of second-degree murder, the jury necessarily found the state had proven beyond a reasonable doubt that he had not

acted upon a sudden quarrel or heat-of-passion with adequate provocation. Therefore, we find no error. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Disposition

¶10 For the foregoing reasons, we affirm Tucker's conviction and sentence for second-degree murder.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge